Mariam bte Shaik Mohd Omar v Ong Chin Poh

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 11–73–91
ABDUL HAMID J
27 JULY 1994

Civil Procedure *— Pleadings — Striking out statement of claim — Whether defence of limitation was a ground for striking out — Rules of the High Court 1980 O 18 r 19*

Civil Procedure *— Limitation — Whether Limitation Act 1953 must be expressly pleaded — Whether sufficient to plead that claim is time-barred or statute-barred — Limitation Act 1953*

The appellant filed an action on 13 May 1987 in respect of damage caused to her property as a direct result of construction work carried out on the respondent's neighbouring property. The construction work concluded in 1979. The respondent raised limitation as his defence and the sessions court judge allowed his application to strike out the appellant's statement of claim. The appellant appealed, contending, inter alia, that the respondent could not apply to strike out a claim on the basis of limitation and that the Limitation Act 1953 had to be expressly pleaded by name.

Held, dismissing the appeal:

(1) The respondent could rely on the defence of limitation to strike out the appellant's claim.

(2) The Limitation Act 1953 need not be mentioned by name and it would be sufficient for the respondent to say that the claim is time-barred by limitation or statute-barred.

[Bahasa Malaysia summary

Perayu telah memfailkan suatu tindakan pada 13 Mei 1987 berkaitan dengan kerosakan yang dialami oleh harta tanahnya sebagai suatu akibat langsung daripada kerja pembinaan yang telah dijalankan di atas harta responden yang berhampiran. Kerja pembinaan tersebut telah berakhir pada tahun 1979. Responden telah menimbulkan had masa tindakan sebagai pembelaannya dan hakim mahkamah sesyen telah membenarkan permohonan beliau untuk membatalkan pernyataan tuntutan perayu. Perayu telah membuat rayuan, dan menegaskan, antara lain, bahawa responden tidak boleh memohon untuk membatalkan suatu tuntutan atas alasan had masa dan bahawa Akta Had Masa 1953 perlu dinamakan secara nyata sebagai suatu pli.

Diputuskan, menolak rayuan itu:

(1) Responden boleh bergantung pada pembelaan had masa untuk membatalkan tuntutan perayu.

(2) Akta Had Masa 1953 tidak perlu dinamakan dan adalah mencukupi jika responden menyatakan bahawa tuntutan itu dihalang oleh had masa atau dihalang oleh statut.]

Notes

For cases on striking out, see 2 *Mallal's Digest* (4th Ed) paras 1780–1825, 2340–2439; [1989] Mallal's Digest 446; [1990] Mallal's Digest 358–367; [1991] Mallal's Digest 395–414; [1992] Mallal's Digest 329–342; [1993] Mallal's Digest 254–267.

For cases on limitation, see 2 *Mallal's Digest* (4th Ed) paras 1748–1749; [1989] Mallal's Digest 435–443; [1990] 337–340; [1991] Mallal's Digest 373–374; [1992] Mallal's Digest 300.

Cases referred to

Estate of Choong Lye Hin, Decd; Choong Gim Guan v Choong Gim Seong, Re [1977] 1 MLJ 96 (folld)

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors [1983] 2 MLJ 227 (folld)

Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 (not folld)

Tio Chee Hing & Ors v Government of Sabah [1981] 1 MLJ 207 (folld)

Yeo Chu Hui v Lim Cheng Jin & Anor [1993] 1 AMR 18 (not folld)

Legislation referred to

Limitation Act 1953
Public Authorities Protection Act 1948
Rules of the High Court 1980 O 18 r 19
Subordinate Courts Rules 1980 O 14 r 21

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Eric Tan Kim Hong (*Johari Ahmad & Tan*) for the respondent.

Abdul Hamid J: The plaintiff [appellant] commenced this action on 13 May 1987 as the registered proprietor of premises and land known as 124 Malacca Street, Penang. The defendant [respondent] is the owner of the neighbouring land and premises known as 126, 126A, 126B along the same road, which the defendant bought in 1976. After purchasing the said land, the defendant demolished the existing one-storey building and constructed a three-storey dwelling house in its place. The plaintiff alleged that as a direct result of the defendant's building construction work the plaintiff's plot of land and dwelling house sustained serious damage and had continued to deteriorate.

Paragraph 6 of the statement of claim says:

> Despite the protests and damage caused to the plaintiff's neighbouring property as stated the defendant continued with the construction work until 1979 when the said construction work was concluded.

A The plaintiff claims for:

(a) damages for inconvenience and mental anguish;

(b) special damages at RM17,040;

(c) interest;

B (d) costs; and

(e) further and other reliefs.

The defendant in his defence, denies that his construction work had caused damage to the plaintiff's property. In para 9 of the defence, the defendant says, 'The defendant pleads that the plaintiff's claim is statute-
C barred'.

On 25 August 1988, the defendant filed a notice of application to strike out the summons and the statement of claim under O 14 r 21 of the Subordinate Courts Rules 1980 ('SCR 1980') which is in pari materia with O 18 r 19 of the Rules of the High Court 1980 ('RHC 1980').

D The learned judge of the sessions court allowed the defendant's application, on the ground that the cause of action was statute-barred.

The learned sessions court judge made a finding of fact which was not disputed in the appeal before me and which I accept. That is, that the construction work was completed in July 1977. However this finding of
E fact is not really material as, even if we were to take the completion date as 1979 as alleged by the plaintiff, still the action was commenced more than six years later.

Before me, Mr Karpal Singh, learned counsel for the plaintiff raised two issues. The first is whether the action is statute-barred. The second,
F which is actually connected with the first issue, is whether nuisance was pleaded.

After hearing the arguments on both sides, I reserved my decision for two days. During that period, learned counsel for the plaintiff submitted some authorities as well as raising a new point that there was delay on the part of the defendant in making the application under O 14 r 21 of the
G SCR 1980.

Mr Karpal Singh drew my attention to two decisions of the High Court in which the learned judges held that a defendant could not apply to strike out a claim under O 18 r 19 of the RHC 1980 on the basis of a good limitation defence. The two authorities are: *Yeo Chu Hui v Lim*
H *Cheng Jin & Anor* [1993] 1 AMR 18 and *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83. The judgment in the last-mentioned case was confirmed by the Supreme Court very recently, but we have not had the advantage of the written judgment yet.

I On the other hand, I found two decisions of the Federal Court which say otherwise. The first case is *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207. In that case, the defendant did not enter appearance or file a defence but applied to strike out the statement of claim on the

ground, inter alia, that the claim was statute-barred. The learned trial judge held that the claim was statute-barred and he dismissed the claim. The plaintiffs appealed to the Federal Court. The Federal Court dismissed the appeal and, inter alia, held:

> (2) in any event, the appellants' claim was clearly statute-barred and not maintainable against a defence that relied on limitation; ...

The other case is *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors* [1983] 2 MLJ 227. In this case the appellants (plaintiffs) filed suits against the Menteri Besar, the State Secretary and the Government of Kelantan alleging that their dismissal as penghulus was unconstitutional and unlawful. The respondents (defendants) did not file a defence but applied for the writ to be struck out under O 18 r 19 of the RHC 1980. It was averred that the actions were filed too late as they were statute-barred by the Public Authorities Protection Act 1948.

Eusoff Chin J (as he then was) struck out the writs and the appellants/plaintiffs appealed. The Federal Court dismissed the appeals and, inter alia, held:

> (1) where it was clear that the defendants were going to rely on limitation and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out; ...

I am aware that in the two Federal Court decisions the relevant statutes are the Public Authorities Protection Act 1948, not the Limitation Act 1953 as in this case. However, I am of the view that the principle applicable is the same.

So, there are two lines of authorities before me. With greatest respect to the two learned judges who decided *Yeo Chu Hui*'s case and *Tengku Ali*'s case, I think I am bound to follow the two Federal Court decisions because, firstly, they are decisions of the Federal Court and are binding on me. Secondly, it is unfortunate that the two decisions of the Federal Court were not referred to the learned judges when the two other cases were argued before them.

In conclusion I take the view that the defendant may rely on the defence of limitation in his application to strike out the plaintiff's claim.

The next point is whether limitation was sufficiently pleaded in the defence. Learned counsel for the plaintiff submitted that the Limitation Act 1953 must be mentioned by name. He relied on the wording of s 4 of the Act itself, stressing on the words '*unless this Act has been expressly pleaded*'. In this regard I am grateful to Mr Eric Tan, counsel for the defendant for showing me the decision of the Federal Court in *Re Estate of Choong Lye Hin, Decd; Choong Gim Guan v Choong Gim Seong* [1977] 1 MLJ 96. That case clearly says that the Ordinance (now Act) need not be mentioned by name but it would be sufficient for the defendant to say that the claim is time-barred by limitation or statute-barred. I think that that case gives a complete answer on this point.

A The next question is whether the cause of action is a continuous one because if it is so then limitation would not set in. Mr Karpal Singh argued that the cause of action was for nuisance and therefore it did not cease upon the completion of the construction work.

I have reproduced para 6 of the statement of claim. It talks about B damage caused to the plaintiff's property '*until 1979 when the said construction work was concluded*'. However in prayer (a) the plaintiff claimed for damages, for inconvenience and mental anguish. But nowhere in the statement of claim did the plaintiff make any mention of nuisance or any injury to the plaintiff. The plaintiff's claim only speaks of damage to her property when the construction work was being carried out by the defendant.

C It is clear to me that the plaintiff did not plead nuisance. I agree with the finding of the learned sessions court judge on this point. I agree that the plaintiff's cause of action is statute-barred.

There is another issue, namely, locus standi. This was not pleaded by the defendant. However, in his affidavit in support of the notice of D application, the defendant averred that the plaintiff had no locus standi because as on the day the action was commenced, the plaintiff was not the registered owner of the land known as No 124 Malacca Street, Penang. The notes of evidence before the learned sessions court judge shows that this point was taken up by the learned counsel for the defendant. However, E the learned sessions court judge did not touch on it in her grounds of judgment. As a result even Mr Karpal Singh did not include that point as one of his grounds in the memorandum of appeal.

In the circumstances, and in view of my finding on grounds discussed earlier, I do not think that it is necessary to decide on that issue.

F Lastly, in his letter to me delivered one day after the appeal was heard, and one day before I delivered my decision, learned counsel for the plaintiff raised another point, that is, delay on the part of the defendant in making the application in question.

This point was never raised at any time earlier. In fairness to the G defendant I do not think I should entertain it.

I dismissed the appeal with costs.

Appeal dismissed.

Reported by Anne Khoo

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